MOTION FILED
JAN 4 1990

No. 89-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALICE CHATHAS and BYRON ELLIS,

Petitioners,

v.

NORBERT SMITH, Individually and as Chief of Police of Village of Evergreen Park, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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January 4, 1990

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 36.3 of the Rules of this Court, the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Lawyers' Committee") moves for leave to file a brief *amicus curiae* in support of the Petitioners in the above-captioned proceeding. In support of this motion, the Lawyers' Committee states:

1. Although the attorney for the Petitioners has consented to the filing of the attached proposed brief *amicus curiae*, the attorneys for the Respondents have refused consent.

2. The Lawyers' Committee has represented plaintiffs in numerous actions against police departments and other governmental entities, often in causes that have been viewed as unpopular. Over the past twenty years, hundreds of private attorneys have contributed their services to work on Lawyers' Committee cases filed to eliminate inequities in the law on behalf of the voiceless and dispossessed members of society. The holding of the Seventh Circuit Court of Appeals in this cause trivializes the constitutional rights of both an attorney and her client, and could have a serious chilling effect on the willingness of attorneys to represent clients with unpopular causes. Therefore, the Lawyers' Committee has an essential interest in having this Court grant certiorari to the Petitioners.

3. The Lawyers' Committee believes that this case is of great importance to all citizens of the United States since it presents issues related to basic Fourth and Fourteenth Amendment rights to be secure from unreasonable searches, seizures, and the use of excessive force. In particular, it raises serious issues related to the conflict among the Circuit Courts of Appeals as to the retroactive application of last term's decision in *Graham v. Connor*, 109 S.Ct. 1865 (1989). It also presents the issue of each person's right of access to the courts. These kinds of issues have been the touchstone of the work of the Lawyers' Committee for the past two decades.

4. Because of the national significance of the issues involved in the case and the failure of Petitioners to raise fully the issue of the retroactive application of *Graham*, the Lawyers' Committee feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own parochial interests.

For the foregoing reasons, the Chicago Lawyers' Committee for Civil Rights Under Law requests that the Court grant this motion for leave to file the attached brief *amicus curiae.*

January 4, 1990

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PROPOSED BRIEF OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") is one of eight affiliated civil rights organizations around the country that were formed in the 1960's and 1970's to provide *pro bono* legal representation to people who were being deprived of their

civil rights. Over the past two decades the Lawyers' Committee has represented the interests of Blacks, Hispanics, women, and the disabled in hundreds of cases related to employment discrimination, housing discrimination, equal access to public accommodations, education, and voting rights.

Among those actions have been several major lawsuits against municipalities and police departments for violations of civil rights. The Lawyers' Committee's cases are handled, in large measure, by volunteer attorneys. In this matter, the treatment of both Petitioners as well as the holdings of the Seventh Circuit Court of Appeals that the seizure and force used against attorney Chathas and her client Ellis were within constitutional limits could have a serious chilling effect on the willingness of attorneys to represent clients with unpopular causes. Thus, the Lawyers' Committee, which relies so heavily on the *pro bono* work of attorneys, has an essential interest in having this Court grant certiorari to the Petitioners.

REASONS FOR GRANTING THE WRIT

I.

BY FAILING TO APPLY THE *GRAHAM* STANDARD TO CHATHAS' AND ELLIS' EXCESSIVE FORCE CLAIMS, THE SEVENTH CIRCUIT IGNORED THE LONG ESTABLISHED PRINCIPLE THAT NEWLY-FASHIONED LEGAL RULES SHOULD BE APPLIED TO PENDING CIVIL CLAIMS—A PRINCIPLE THAT SO CLEARLY DICTATES THE RETROACTIVE APPLICATION OF *GRAHAM* THAT EVERY OTHER LOWER COURT CONSIDERING THE ISSUE HAS FOUND IT CONCLUSIVE.

A. The Seventh Circuit's Decision Not To Apply The Fourth Amendment "Reasonableness Test" Of *Graham* To Petitioners' Pending Excessive Force Claims Conflicts With The Holdings Of The Second, Fifth, Eighth, And District Of Columbia Circuits.

Last term in *Graham v. Connor*, 109 S. Ct. 1865 (1989), this Court firmly embraced a uniform framework for excessive force claims brought in the context of "an arrest or investigatory stop, or other 'seizure' of a free citizen." *Id.* at 1871. Distinguishing such claims from those brought by pretrial detainees and prisoners, the Court concluded that all such claims "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.*

Although Petitioners do not directly raise the issue of retroactive application of *Graham* in their petition for certiorari, *amicus* argues that this is a crucial issue that should be considered here. Last term in *Teague v. Lane*, 109 S. Ct. 1060 (1989), this Court recognized the propriety of addressing the question of retroactivity in just this situation, either when an *amicus* brief raises the issue, or when the Court *sua sponte* decides to address it. *Id.* at

1069. *Amicus* respectfully submits that the Court should address the issue of retroactivity here since the Seventh Circuit decision in this case was contrary to well established case law when it failed to apply the holding in *Graham* retroactively.

Prior to the decision in *Graham*, most lower federal courts had endorsed a far less accommodating substantive due process standard. Indeed, the Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits had routinely applied a due process standard to excessive force claims based on police mistreatment during an investigatory stop or seizure. *See* Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 695 n.20. A few other circuits, the Seventh included, initially relied on a due process analysis before adopting a Fourth Amendment "objecti reasonableness" standard. *Compare Lester v. City o hicago*, 830 F.2d 706 (7th Cir. 1987) (excessive force claims should be founded on the Fourth Amendment) *with Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985) (endorsing due process approach).

This near consensus among lower courts ensured that while the pre-*Graham* due process regime held sway, nearly all excessive force claims based on police behavior during an arrest or investigatory stop were subject to the much higher "shocks the conscience" standard. Such claims, in turn, represented a significant proportion of *all* excessive force claims, including those brought by pretrial detainees and prisoners. *See Freyermuth*, 1987 DUKE L.J. at 694-95 (roughly half of all excessive force claims).

In the period that has elapsed since *Graham*, those circuits which had adopted the prevailing due process standard and circuits, like the Seventh, which had only recently rejected such an approach, have had to choose the

proper standard to apply to the pending claims that arose prior to this Court's adoption of the Fourth Amendment standard. In addition to the Seventh Circuit, four other circuits have considered the retroactive application of *Graham*. *See Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989); *Brown v. Glossip*, 878 F.2d 871, 873 (5th Cir. 1989); *Graham v. Davis*, 880 F.2d 1414, 1419 (D.C. Cir. 1989); *Miller v. Lovett*, 879 F.2d 1066, 1069-70 (2d Cir. 1989); *Johnson v. Morel*, 876 F.2d 477, 478 (5th Cir. 1989). With the glaring exception of the Seventh Circuit, in each case the circuit court has applied the holding in *Graham* to pending claims.

The consensus among other circuits notwithstanding, the majority below summarily rejected the retroactive application of *Graham* to Chathas' and Ellis' excessive force claims. Although acknowledging *Graham*'s unequivocal endorsement of a Fourth Amendment analysis, the *Chathas* majority expressly considered and declined to apply *Graham* to Petitioners' excessive force claims. *See Chathas v. Smith*, 884 F.2d 980, 988 (7th Cir. 1989).

Given the split among the circuits and the certainty that this issue will recur with great frequency, granting certiorari in this case would be entirely consistent with the Court's practice of quickly resolving the retroactive force of recently fashioned important constitutional rules. *See, e.g., Brown v. Louisiana*, 447 U.S. 323 (1980) (addressing the retroactivity of *Burch v. Louisiana*, 441 U.S. 130 (1979)); *United States v. Johnson*, 457 U.S. 537 (1982) (addressing retroactivity of *Payton v. New York*, 445 U.S. 573 (1980)); *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (addressing retroactivity issue raised by *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *see generally Johnson*, 457 U.S. at 542 ("Since *Linkletter*, the Court's announcement of a constitutional rule in the realm of criminal procedure has

been followed by a separate decision explaining whether, and to what extent, that rule applies to past, pending, and future cases."). Such a course should be followed here.

B. Under The Court's Three-Part Test In *Chevron Oil*, The Seventh Circuit Erred In Not Applying *Graham*'s Fourth Amendment Standard To Chathas' And Ellis' Excessive Force Claims.

From the time of Chief Justice Marshall, in the vast majority of cases this Court has held that an appellate court should apply the case law governing at the time of appeal even if that case law has changed the law prevailing at the time of trial and at the time of the incidents forming the basis of suit. In cases not involving the imposition of criminal liability, this Court has rarely wavered from the principle of retroactive application of judicial decisions, a principle this Court observed should be "familiar to every law student." *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *see also Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987).

Only in "certain defined circumstances," *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987), have courts employed the three-part test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to limit a rule to prospective application. *See Lund v. Shearson/Lehman/American Express, Inc.*, 852 F.2d 182, 184 (6th Cir. 1988) ("exception to retroactivity" should be construed "narrowly"); *EEOC v. Vucitech*, 842 F.2d 936, 941-42 (7th Cir. 1988) (presumption "strongly in favor of retroactive application"). Under *Chevron*, a court may refuse to apply a newly-decided rule of law retroactively only if the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clear-

ly foreshadowed." 404 U.S. at 106. Even if this threshold requirement were met, a court still would have to "weigh the merits and demerits" of retroactive application, *id.* at 106-107, and "the inequity imposed by retroactive application." *Id.* at 107. Even assuming that *Graham* overruled clearly established precedent, the other two considerations articulated in *Chevron* counsel this Court to uphold the "general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969).

The retroactive application of *Graham* will not produce an inequitable result, and in fact furthers the rationale underlying section 1983: compensating victims of unconstitutional conduct by government officials. This Court has found retroactive application to be inequitable especially when past expectations have been firmly based on bright line rules. Yet such is not the case here. In *Chevron* itself, the Court rejected the retroactive application of a statute of limitations that would have time-barred petitioner's claim. *See Chevron*, 404 U.S. at 108. The Court in *Saint Francis College v. Al-Khazraji*, 107 S. Ct. at 2025, refused to foreclose respondent's section 1981 claim through the retrospective application of a new statute of limitations. In both cases, the party that would have been prejudiced had formed expectations based on an unequivocal prior rule that precisely specified conforming conduct. *See Chevron*, 404 U.S. at 108. As the *Chevron* Court noted, defeating expectations based on less clearly-established prior rules "would not work a comparable hardship." 404 U.S. at 108 n.10.

Such is the case with the *Graham* decision. Retroactive application will impinge on far less well-established expectations. In striking contrast to an obligation to file suit

within a set period of time, the due process standard incorporated only a general proscription against behavior that " 'shocks the conscience.' " *Graham*, 109 S. Ct. at 1870 (citation omitted). Given the amorphous nature of this standard, police departments and law enforcement officers in the field are most unlikely to have been led to believe that the use of force on any given occasion would pass constitutional muster.

Moreover, any expectations that law enforcement officers may have formed about the constitutionality of employing more than the "reasonable" amount of force permitted by *Graham* are illegitimate. The *Graham* Fourth Amendment standard fully accommodates legitimate law enforcement concerns by excusing all uses of force that are reasonable "in light of the facts and circumstances"—a standard that allows for "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving . . . ." *Graham*, 109 S. Ct. at 1872. Unlike the case of the plaintiffs in *Chevron* and *St. Francis Hospital* whose lawsuits would have been foreclosed by the application of the "new" rule, here there can be no legitimate law enforcement rationale for employing more force than that permitted under *Graham*. Retroactive application of *Graham* is entirely consistent with the precept that "an unconstitutional scheme could not be retained . . . even for a brief period if the expectations sought to be protected were themselves unreasonable or illegitimate. . . ." *Heckler v. Mathews*, 465 U.S. 728, 746 (1984).

This Court has recognized that compensating "persons for injuries caused by the deprivation of constitutional rights" is "the basic purpose of a section 1983 damages award." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). This

general principle applies with particular vigor to excessive force claims for which there is no adequate alternative remedy. To allow the Seventh Circuit's decision to stand would be to trivialize the constitutional rights invoked by Petitioners. This Court has acknowledged a duty to " 'resolve all cases . . . on direct review in light of [the Court's] best understanding of governing constitutional principles.' " *United States v. Johnson*, 457 U.S. 537, 555 (1982) (citation omitted). " 'If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced.' " *Id.* Retroactive application of *Graham* would allow a just result.

In sum, the Seventh Circuit's refusal to apply *Graham* retroactively is an indefensible departure from a proper and long-accepted principle. This Court should grant certiorari to correct this error, to resolve the conflict among the Circuit Courts of Appeals, and to provide guidance to other lower courts that will face this issue in the future.

II.

WHEN PETITIONER CHATHAS ENTERED THE COURTHOUSE TO REPRESENT HER CLIENT, RESPONDENTS DEPRIVED HER OF HER FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEIZURE AND EXCESSIVE FORCE BY FORCIBLY LIFTING HER OFF HER FEET AND MOVING HER INTO A DARKENED JURY ROOM.

According to the facts elicited at trial, facts which must be taken in the light most favorable to Petitioners, as Petitioner Chathas entered the courthouse, she and her purse were scanned by a metal detector. When she then

attempted to proceed to the courtroom for her client's hearing, Respondents seized Chathas, lifted her off her feet, carried or dragged her across the rotunda of the courthouse, and deposited her into a darkened jury room. Once in the jury room, Respondents searched her purse and subjected Chathas to a pat down search. Throughout the entire incident, Respondents refused to answer Chathas' requests for information about the reason she was being seized and where Respondents were taking her.

The Fourth Amendment to the United States Constitution protects persons against unreasonable seizures. It is undenied that Chathas was seized. In *Terry v. Ohio*, this Court recognized that the seizure of a person includes *any* conduct that "by means of physical force . . . has in some way restrained the liberty of a citizen." 392 U.S. 1, 19 n.16 (1968). The question here is whether this seizure was reasonable. *Amicus* argues that in light of the surrounding circumstances, the seizure of Chathas was unreasonable and a violation of the Fourth and Fourteenth Amendments. *Tennessee v. Garner*, 417 U.S. 1, 8-9 (1985). First, Chathas was an attorney who had come to the courthouse to represent her client at trial, a trial, it should be noted, in which some of the Respondents were defendants. As an officer of the court, Chathas could have expected to have been and should have been treated with more respect and dignity. Second, having already examined Chathas' person and purse with a metal scanner, Respondents knew that she was not armed. They therefore had no probable cause for seizing and physically moving her to the jury room for a further search. When Chathas repeatedly asked why she was being searched and where she was being taken, Respondents would not even answer. Finally, whatever probable cause Respondents may have had to seize Petitioner Ellis, they had no probable cause to search, seize, or detain Petitioner Chathas. Thus, in light

of the surrounding circumstances, the seizure of Chathas was unreasonable and violated her Fourth Amendment rights. *Graham v. Connor*, 109 S. Ct. 1865 (1989). As Judge Fairchild noted in his dissenting opinion, at the very least, Chathas "made out a prima facie case, of unreasonable seizure of her person in violation of the Fourth Amendment," and the jury should have been allowed to consider the issue. *Chathas v. Smith*, 884 F.2d at 990. Because the granting of the directed verdict motion by the district court was plain error, the Seventh Circuit should have reversed and remanded the case for further proceedings.

The fact that Chathas was an attorney who was at the courthouse to represent her client at a trial that involved some of the Respondents emphasizes the egregious nature of the Respondents' conduct. *Amicus* urges this Court to grant the petition for writ of certiorari in order that such unreasonable searches and seizures of attorneys will not go unredressed. To allow such conduct could inhibit the filing of nonfrivolous cases against governmental agencies and law enforcement officers. Thus, this case has significant implications for all attorneys, particularly for public interest and civil rights attorneys.

In addition to challenging the unreasonableness of her seizure under the Fourth and Fourteenth Amendments, Chathas claimed that her seizure was effectuated with excessive force. This Court recently held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." *Graham v. Connor*, 109 S. Ct. at 1871 (emphasis in original). As was noted above in the first section, it is a well-settled principle that with few exceptions,

a circuit court of appeals should apply the decisions of this Court, even decisions rendered during the time intervening between the judgment of the trial court and the consideration of the case by the appellate court. In accordance with this principle, several Circuit Courts of Appeals have applied *Graham* in cases similar to this one. In *Miller v. Lovett*, the Second Circuit held, "In light of *Graham*, [decided four days before *Miller* was argued to the circuit court], it was plain error to charge the jury under the old . . . standard for evaluating excessive force claims . . . ." 879 F.2d 1066, 1070 (2d Cir. 1989). Such should have been the case here as well.

However, the United States Court of Appeals for the Seventh Circuit refused to apply this Court's holding in *Graham*. While noting *Graham*, the Seventh Circuit affirmed the district court's use of a very different standard. Further, the Seventh Circuit's opinion is internally inconsistent. The court appears to suggest that since the *Graham* decision was decided after the Respondents' use of excessive force, the conduct must be measured against the standard that was in place at the time. However, the standard that the district court used (the more stringent test adopted in *Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985)) had itself not been decided at the time of the Respondents' conduct. In sum, the Seventh Circuit's decision is contrary to the decision of this Court in *Graham* which should have been controlling and applied in this case.

Finally, this Court withheld its consideration of the "proper application" of qualified immunity claims "in excessive force cases that arise under the Fourth Amendment" in *Graham*. 109 S. Ct. at 1873 n.12. *Amicus* urges this Court to grant the petition for writ of certiorari and take the opportunity this case affords to address that issue.

III.

RESPONDENTS DEPRIVED PETITIONER ELLIS OF HIS FOURTEENTH AMENDMENT RIGHT OF ACCESS TO THE COURTS AND HIS FOURTH AND FOURTEENTH AMENDMENT RIGHT AGAINST EXCESSIVE FORCE BY PHYSICALLY ASSAULTING HIM WITHOUT CAUSE, FORCIBLY HOLDING HIM IN A JURY ROOM, AND PREVENTING HIM FROM APPEARING AT A SCHEDULED HEARING.

Access to the courts is a hallmark of this nation's justice system and is guaranteed by the Due Process Clause of the Fourteenth Amendment. As the Seventh Circuit itself noted, "To deny such access defendants need not literally bar the courthouse door . . . ." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984). Here, that is exactly what Respondents did; they effectively barred the courthouse door. But in this case the Seventh Circuit held that because Petitioner Ellis eventually won the case for which he was at the courthouse the day Respondents deprived him of his constitutional rights, he was not "prejudiced" by the deprivation and, therefore, had no right to any redress.

Bell involved a claim by a decedent's family and estate against defendant police officers who concealed the facts surrounding decedent's death. If one applied the Seventh Circuit's analysis in the instant case to the facts in *Bell*, the plaintiffs would have had no claim because they ultimately found out that defendants were concealing facts and successfully sued the defendants. However, there, the Seventh Circuit held that the mere concealment of material facts by the defendants was a violation of the plaintiffs' constitutional due process right of access to the courts. Here, Respondents did not conceal facts, but attempted to "conceal" Petitioner and actually prevented him from appearing in court that day. Such conduct con-

stituted a violation of Petitioner's due process right of access to the courts.

Respondents also violated Ellis' constitutional right against excessive force. Assuming *arguendo* that Respondents had probable cause to seize Ellis, the question remains whether that seizure was effected with excessive force. As stated above, the excessive force claim should have been analyzed under the *Graham* reasonableness standard. While ultimately such question is a question of fact to be decided by a jury, and should have been allowed to go to the jury in this case, *amicus* supports Petitioners' claim that the force used to effectuate the seizure was excessive.

First, after scanning Ellis with the metal scanner and searching his briefcase, Respondents knew that he was unarmed. Second, without giving either Chathas or Ellis an explanation, Respondents carried or dragged away Ellis' attorney and then physically assaulted Ellis as he tried to make his way to the courtroom in which his hearing was to be held. Third, Ellis was exhibiting no unusual or violent behavior, nothing that would give cause for alarm or call for the beating that he received at the hands of Respondents. Fourth, Respondents refused to give Ellis an explanation or reason for the seizure or to state whether he was under arrest. Fifth, Respondent Cainkar, an attorney acknowledged that Ellis' constitutional rights were being violated. Cainkar repeatedly stated that he did not care whether he was violating Ellis' civil rights, and that he did not give a "damn" about the law. *See* Petition at 8. Such utter disregard for constitutional rights should not go unredressed.

Again, *amicus* emphasizes that this Court need not decide the issue of whether Respondents' treatment of Petitioner Ellis was violative of the Fourth Amendment. Since under the reasonableness standard, Petitioner Ellis made

out a prima facie case and the issue should have been allowed to go to the jury. *See Chathas v. Smith*, 884 F.2d at 990 ("Ellis sufficiently made out a *prima facie* case that he was subjected to excessive force by the defendants he identified.") (Fairchild, J., dissenting). Because this case represents such a departure from the accepted and proper judicial proceedings with regard to the granting of a motion for directed verdict, this Court should grant the petition for certiorari and remand the case for a new trial. If this Court allows the circuit courts of appeals to act as judge and jury, the right to a jury of one's peers becomes a hollow one.

CONCLUSION

For these various reasons, particularly the conflict among the circuits on the retroactive application of *Graham*, *amicus* submits that the petition for certiorari should be granted.

January 4, 1990

Respectfully submitted,

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